Supreme Court, U.S.
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No. 01-655

In The

Supreme Court of the United States

MC ASSOCIATES,

Petitioner,

v.

INHABITANTS OF THE TOWN OF CAPE ELIZABETH, CAPE ELIZABETH TOWN COUNCIL, CAPE ELIZABETH PLANNING BOARD, CAPE ELIZABETH ZONING BOARD OF APPEALS, AND CAPE ELIZABETH CODE ENFORCEMENT OFFICER,

Respondents.

On Petition For Writ Of Certiorari To The Maine Supreme Judicial Court Sitting As The Law Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Maine Supreme Judicial Court's finding that the 1990 wetland ordinance did not deprive the Petitioner of a property interest turned on the timing of ownership of the subject parcel?

2. Whether the stipulated facts support the Maine Supreme Judicial Court's conclusion that the subject parcel was not deprived of all economically viable use?

3. Whether the stipulated facts support the Maine Supreme Judicial Court's conclusion that the Petitioner failed to present sufficient evidence to support a takings claim under state or federal law?

4. Whether the Petitioner's claims were rejected by the Maine Supreme Judicial Court on the grounds that the dispute was not ripe for adjudication?

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CAPE ELIZABETH'S BRIEF IN OPPOSITION

Respondents Inhabitants of the Town of Cape Elizabeth, Cape Elizabeth Town Council, Cape Elizabeth Planning Board, Cape Elizabeth Zoning Board of Appeals, and Cape Elizabeth Code Enforcement Officer (collectively "Cape Elizabeth") respectfully request that the Court deny the Petition for Writ of Certiorari seeking review of the Decision and Judgment of the Maine Supreme Judicial Court, sitting as the Law Court ("Law Court") issued on June 15, 2001, which is reproduced in the Appendix to the Petition ("P.A.") at App. 1 and was reported at *MC Associates v. Town of Cape Elizabeth*, 773 A.2d 439 (Me. 2001). The Petitioner's efforts to recast this case for the purposes of the Petition are unavailing and the Court should reject the Petitioner's request for review.

The dispute in this case did not present the Law Court with any novel constitutional issues. After holding that the Petitioner's state and federal takings claims were ripe for decision, the Law Court ruled that the stipulated record did not support either claim. In particular, the Law Court held that the 1990 wetland ordinance passed by the Town of Cape Elizabeth did not deprive the Petitioner of all economically viable use of the subject parcel. It noted that the Petitioner failed to demonstrate that the subject parcel could have been used to build a single-family home before 1990 or that the 1990 ordinance adversely affected the value of the subject parcel. In reaching its conclusion, the Law Court construed relevant provisions of state law and the Town's ordinance.

The Petitioner limited its constitutional challenge to the regulatory effect of the Town of Cape Elizabeth's 1990 wetland ordinance. At no time prior to the filing of the Petition did the Petitioner suggest that any other regulation by the Town worked a taking of the subject parcel. In addition, the Law Court did not rule that the Petitioner was barred from asserting a takings claim on the ground that it acquired the subject parcel after the regulation took effect. The Petitioner's efforts to raise new issues in this Petition should not be rewarded with a Writ of Certiorari.

STATEMENT OF THE CASE

The dispute in this case involves an 18,570 square foot parcel of land situated in Cape Elizabeth, Maine. The Petitioner acquired the subject parcel by a deed dated January 11, 1989. (Stipulation of Facts ¶¶ 1 & 6) (hereafter "SF ¶ ___").[1] The Petitioner did not pay any money to acquire the property. *Id.* ¶ 3. In fact, the Petitioner is unaware whether its predecessors-in-interest paid for the property and, if so, what amounts were paid. *Id.* It is undisputed that the subject parcel was a lot of record prior to 1968. *Id.* ¶ 40.

As of January 11, 1989, the Town's ordinance would not have allowed the construction of a single-family

[1] Citations are to the Stipulation of Facts that the parties submitted to the Maine Superior Court. For the Court's convenience, a copy of the Stipulation is attached to this brief as an Appendix.

house on the lot. *Id.* ¶ 4. The ordinance requires at least 20,000 square feet of lot area for any proposed residential construction that depends upon private sewerage. *Id.* ¶ 4 (Smith Aff. ¶ 3 & Exh. 1). It is undisputed that any home constructed on the subject parcel would require private sewerage. *Id.* ¶ 5.

On April 9, 1990, the Cape Elizabeth Town Council voted to enact amendments to its land use ordinance establishing three wetland zones: critical wetland district, critical wetland buffer, and wetland protection district. *Id.* ¶ 7 (hereafter "the 1990 wetlands ordinance" or "the 1990 ordinance"). The purpose of the 1990 ordinance was to further the comprehensive plan by promoting "the health, safety and general welfare of its residents." *Id.* ¶ 10 (Smith Aff. ¶ 4 & Exh. 2 (Ch. 19, sec. 19-1-2)). In relevant part, the Town sought to: "encourage the most appropriate use of land throughout the Town[,] . . . to promote the coordinated development of unbuilt areas[,] . . . [and] to conserve natural resources." *Id.* ¶ 10 (Smith Aff. ¶ 4 & Exh. 2 (Ch. 19, sec. 19-1-2)). With respect to the wetland protection provisions in particular, the 1990 ordinance provides:

> The wetlands of the Town of Cape Elizabeth are fragile natural resources which provide for wildlife habitat, pollution control, storage and passage of flood waters, aquifer recharge, erosion control, education, scientific study, recreation and open space. Considerable wetland acreage nationally has been lost or impaired by drainage, dredging, filling, excavating, building, polluting, and other activities inconsistent with the natural uses of such areas. Therefore, it is the policy of the Town of Cape Elizabeth to

> ensure that wetlands are protected from detrimental impacts and that wetland alteration activities do not threaten public safety, welfare or cause nuisances, or negatively alter natural wetland ecology.

Id. ¶ 10 (Smith Aff. ¶ 4 & Exh. 2 (Ch. 19, sec. 19-3-9-01)).

The 1990 wetland ordinance, which became effective on May 9, 1990, provides that no development of houses can occur in critical wetland districts. *Id.* ¶ 17. Moreover, in relevant part, the amendment forbade development of houses within 250 feet of any critical wetland district that is not separated from adjacent areas by topography or other natural features. *Id.* ¶ 18.[2]

In March of 1996, the Petitioner submitted to the Town's Code Enforcement Officer a building permit application to construct a single-family residence on the subject parcel. *Id.* ¶ 19. The CEO denied the application on April 10, 1996. *Id.* ¶ 19. The Petitioner submitted additional materials in support of its application by a letter dated May 10, 1996. *Id.* ¶ 20. The CEO again denied the Petitioner's application. *Id.* ¶ 21.

The Petitioner requested a verification of the wetland boundary. *Id.* ¶ 22. The Town Planning Board received a

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[2] These provisions remained substantively unchanged when the Petitioner requested a building permit in March of 1996. For ease of reference, it should be noted that the zones received new nomenclature in the interim period. Specifically, the critical wetland zones were renamed "Resource Protection 1 – Critical Wetland Zones" ("RP-1"), the buffer zones renamed "Resource Protection 1 – Critical Wetland Buffer" ("RP-1 Buffer"), and the wetland protection zones renamed "Resource Protection 2 – Wetland Protection Zones" ("RP-2").

substantial amount of information on the location of the boundary and held a public hearing. *Id.* ¶ 23. The Planning Board concluded that the RP-1 zone included areas both south and north of Dyer Pond Road. *Id.* ¶ 24. This decision was affirmed by the Maine Superior Court. *Id.* ¶ 25 (Decision and Order at 1-2 (July 16, 1998)). The effect of the Superior Court's decision was to confirm the application of the 250 foot buffer overlay on the Petitioner's property. *Id.* ¶ 26.

On August 6, 1997, the Petitioner "appealed" the Planning Board's decision to the Town Zoning Board of Appeals. *Id.* ¶ 27. At the same time, the Petitioner requested that the Zoning Appeals Board grant it a variance with respect to the 250 foot buffer zone. *Id.* ¶ 28. After a public hearing on August 26, 1997, the Zoning Appeals Board ruled that it had no authority to hear the appeal from the Planning Board and that it could not grant a variance that contradicted the uses permitted in the RP-1 Buffer Zone. *Id.* ¶ 29. The Superior Court also affirmed these findings by the Zoning Appeals Board. *Id.* ¶ 30 (Decision and Order at 1-2 (July 16, 1998)).

According to the Petitioner, the subject parcel has some value notwithstanding the Town's ordinance. *Id.* ¶ 31. The record reflects that the subject parcel is worth at least $3,000. *Id.* ¶ 32. However, the record is devoid of any evidence to establish the value of the parcel before the 1990 ordinance was enacted. Moreover, the stipulated facts do not establish, as the Petitioner suggests, that the subject parcel may only be used to construct a single-family house.

REASONS FOR DENIAL OF THE WRIT

The Petitioner has not articulated a viable basis for review by this Court. It has not demonstrated any conflict between the holdings of this Court and the decision of the Law Court. The Law Court affirmed summary judgment based on a stipulated record that did not support any constitutional claims. This Court should decline to issue a Writ.

I. THE MAINE SUPREME JUDICIAL COURT DID NOT BAR THE PETITIONER'S STATE AND FEDERAL TAKINGS CLAIMS ON THE GROUND THAT IT ACQUIRED THE SUBJECT PARCEL AFTER THE 1990 ORDINANCE TOOK EFFECT.

Relying upon the principal holding of *Palazzolo v. Rhode Island*, 121 S.Ct. 2448 (2001), the Petitioner suggests that the Maine Supreme Judicial Court, sitting as the Law Court ("Law Court"), erroneously barred his state and federal takings claims. To support this argument, the Petitioner maintains that the Town of Cape Elizabeth's *ordinances* – including, it appears, a minimum lot size ordinance enacted in 1968 – prevent development of the subject parcel.

A plain reading of the record below and the Law Court's decision demonstrates that the Petitioner's argument is unfounded. As reflected in the Petitioner's Second Amended Complaint, summary judgment memorandum, and appellate brief to the Law Court, the Petitioner did not challenge the constitutionality of the minimum lot size ordinance passed in 1968. Its claims in this case were premised on the allegation that the 1990

wetland ordinance effected a taking without just compensation under state and federal law. Therefore, the Petitioner's persistent references to the effect of "the regulations" represent a newly raised issue that is not appropriate for review. *See Bragdon v. Abbott*, 524 U.S. 624, 638 (1998) ("It is our practice to decide cases on the grounds raised and considered in the Court of Appeals and included in the question on which we granted certiorari.").

In addition, the Law Court did not rule that the Petitioner was barred from pursuing its state and federal takings claims based on the temporal relationship between its acquisition of the subject parcel and the enactment of the 1990 ordinance. Since there is no dispute that the Petitioner purchased the parcel before the ordinance was passed, it is hardly surprising that the Law Court did not make any reference to the issue that was raised in *Palazzolo*. The Law Court held that the 1990 ordinance did not effect a taking of property without just compensation because the Petitioner could not establish that the ordinance affected the "buildability" of the subject parcel. No issue was raised below with respect to an absolute bar, and the Law Court did not decide such an issue. There is no conflict between the Law Court's decision and *Palazzolo*.

II. THE STIPULATED FACTS SUPPORT THE MAINE SUPREME JUDICIAL COURT'S CONCLUSION THAT THE SUBJECT PARCEL WAS NOT DEPRIVED OF ALL ECONOMICALLY VIABLE USE.

The Petitioner argues that the diminution in value of the subject parcel caused by the 1990 wetland ordinance is so substantial, so close to rendering the parcel's residual value to zero, that a categorical taking has occurred. The stipulated facts however, show that the property retains a value of at least $3,000. This Court has previously held that "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Prod. of California v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993) (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384, 47 S.Ct. 114, 117, 71 L. Ed. 303 (1926)). Here, as the Law Court pointed out, the stipulated record "does not even purport to establish the value of the lot prior to the alleged taking, nor does it address whether the lot retains substantial uses other than to support a single-family residence." (P.A. at App. 11). The Petitioner failed to meet its burden of proof with respect to a categorical taking. The stipulated facts support the Law Court's decision and its legal analysis is consistent with this Court's decision in *Palazzolo*.

III. THE STIPULATED FACTS SUPPORT THE MAINE SUPREME JUDICIAL COURT'S CONCLUSION THAT PETITIONER FAILED TO MAKE A PRIMA FACIE CASE OF AN UNCONSTITUTIONAL TAKING UNDER STATE OR FEDERAL LAW.

The Law Court affirmed summary judgment against the Petitioner on its state and federal takings claims, which included both the categorical takings analysis and the analysis set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). (P.A. at App. 11). While the Law Court dispensed with the Petitioner's claims without a great deal of discussion of *Penn Central*, the Law Court clearly considered the case. In its decision, the Law Court cited *Penn Central* and *Seven Islands Land Co. v. Maine Land Use Regulation Comm'n*, 450 A.2d 475 (Me. 1982), a Maine case that applies *Penn Central* to state and federal takings claims. The Law Court's rejection of the Petitioner's state law inverse condemnation claim effectively resolved any question that had been raised under *Penn Central*.

In any event, the present case is easily distinguishable from *Palazzolo* on this issue. In *Palazzolo*, the Rhode Island Supreme Court held the property owner's claim for a taking under the *Penn Central* analysis was barred because his acquisition postdated the regulation. The Rhode Island Court did not evaluate the diminution of value reflected by the record evidence to test the property owner's claim. By contrast, the Law Court did not bar the Petitioner's claim. Rather, it decided on the merits that "MC failed to present a prima facie case that the lot was

buildable before the enactment of the [1990] wetlands ordinance." (P.A. at App. 10-11). In other words, if the subject parcel could not have been used to construct a single-family residence before the enactment of the 1990 wetland ordinance, then the 1990 wetland ordinance could not have defeated the Petitioner's reasonable investment-backed expectations. The Petitioner failed to present any evidence that the parcel complied with the Town's Private Sewage Disposal Ordinance for development of lots that did not meet the minimum lot size. Therefore, the Petitioner failed in its burden of proof to show that the 1990 wetland ordinance deprived it of any rights it had prior to the enactment of the 1990 ordinance. Since the Law Court's decision on the merits is supported by the stipulated facts and consistent with this Court's decision in *Palazzolo*, the Court should deny the Petition.

IV. THE MAINE SUPREME JUDICIAL COURT DID NOT DENY THE PETITIONER'S APPEAL ON THE GROUNDS OF RIPENESS.

The Petitioner confuses resolution on the merits for justiciability. The Law Court held in the Petitioner's favor when it determined that its claims were ripe for review. Nonetheless, the Petitioner suggests that the Law Court erected "ripeness-type barriers" that are inconsistent with *Palazzolo*. These so-called barriers are actually the application of law to the stipulated facts.

The Petitioner takes issue with three of the Law Court's findings – all of which represent a resolution on the merits. First, the Law Court properly determined that the 1990 ordinance did not affect the use of the subject

parcel as a buildable lot. As a matter of state and local law, the subject parcel could not be used to erect a single-family house since 1968, when the lot-size ordinance was enacted. The Law Court's construction of these state and local enactments is a matter of state law. *See Ward v. Illinois*, 431 U.S. 767, 772 (1977) (construction of state statute by state's highest court binding on Supreme Court). Moreover, the constitutionality of the lot-size ordinance is not at issue in this case and the Petitioner's belated effort to raise the issue is inappropriate. *See Bragdon v. Abbott*, 524 U.S. 624, 638 (1998).

The Law Court's second challenged finding – the Petitioner's lack of compliance with the Town's lot-size ordinance – is closely related to the first. The relevant "non-compliance" is the date on which the subject parcel became a lot of record and the size of the parcel – facts which are not in dispute. The statutory exception upon which the Petitioner's argument is premised does not apply to lots created before 1970, which would include the subject parcel. However, the Town's ordinance does apply to such lots. Since the subject parcel was not large enough for a private sewer system under the Town's ordinance, it could not be used for the construction of a single-family house prior to the enactment of the 1990 wetland ordinance.

The Petitioner's third challenge is obviously an argument on the merits. Contrary to the Petitioner's suggestion, the Law Court correctly determined that the 1990 ordinance did not strip the subject parcel of all economically viable use. The Petitioner neglected to submit any evidence as to the value of the subject parcel before the 1990 ordinance was enacted. Moreover, the Petitioner

failed to generate a factual issue as to whether the lot retains substantial uses. In short, the only conclusion supported by the record is that the subject parcel has value notwithstanding the fact that it cannot be used for a single-family residence. The Law Court was compelled to conclude – consistent with its own precedent and the precedent of this Court – that a taking did not occur. *See Wyer v. Board of Envtl. Prot.*, 747 A.2d 192 (Me. 2000); *Seven Islands Land Co. v. Maine Land Use Regulation Comm'n*, 450 A.2d 475 (Me. 1982); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

CONCLUSION

For the reasons discussed above, the Petition for Writ of Certiorari should be denied.

Dated: November 21, 2001

Respectfully submitted,

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STATE OF MAINE

CUMBERLAND, SS.

SUPERIOR COURT
CIVIL ACTION
Docket No. AP-97-059

MC ASSOCIATES,
Plaintiff

v.

INHABITANTS OF THE TOWN OF CAPE ELIZABETH, et al.,
Defendants

STIPULATION OF FACTS

The parties hereby submit the following stipulation of facts:

1. The Plaintiff acquired the Subject Parcel by a deed from Pine Tree Acres dated January 11, 1989. (Second Amended Complaint ¶ 7).

2. The Subject Parcel is located in Cape Elizabeth, west of Shore Road and north of Dyer Pond Road. *Id.*

3. The Plaintiff did not pay any money to acquire the property. (Cope Dep. at 15). In fact, the Plaintiff is unaware whether its predecessors-in-interest paid for the property and, if so, what amount was paid. *Id.* at 16-17.

4. As of January 11, 1989, the Town's Ordinance required at least 20,000 square feet of lot area for any proposed residential construction that

depended upon private sewerage.[1] (Smith Aff. ¶ 3 & Exh. 1).

5. It is undisputed that any home constructed on the Subject Property will require private sewerage. (Cope Dep. at 22).

6. At best, the Plaintiff's lot contains only 18,570 square feet. (Cope Dep. at 24-25 & Exh. 1).

7. On April 9, 1990, the Cape Elizabeth Town Council voted to enact amendments to the Ordinance establishing three wetlands zones: critical wetlands district, critical wetlands buffer, and wetlands protection district.[2] (Lane Aff. ¶ 11 & Exh. 4; Smith Aff. ¶ 4 & Exh. 2).

8. The Council's action followed two public hearings, during which the proposed amendments were open to public discussion. (Lane Aff. ¶¶ 3, 7 & 11 & Exhs. 2 & 4).

9. These public hearings were publicized in the *Portland Press Herald* in essentially the following form: "The Municipal Officers of the Town of Cape Elizabeth will hold a public hearing on Monday, April 9, 1990, 7:30 PM, Town Hall, on the proposed Wetlands Ordinance." *Id.* ¶¶ 3, 4, 8 & 9 & Exhs. 1 & 3.

10. The purpose of the Ordinance, with the proposed amendments, was to further the comprehensive plan by promoting "the health, safety and general welfare of its residents." (Smith Aff. ¶ 4 & Exh. 2 (Ch. 19, sec. 19-1-2)).

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[1] This provision also exists in the Town's present ordinance.

[2] The amendment became effective 30 days after enactment, on May 9, 1990.

11. In relevant part, the Town sought to: "encourage the most appropriate use of land throughout the Town[,] . . . to promote the coordinated development of unbuilt areas[,] . . . [and] to conserve natural resources." *Id.* (Ch. 19, sec. 19-1-2).

12. With respect to the wetlands protection provisions in particular, the Ordinance provides:

> The wetlands of the Town of Cape Elizabeth are fragile natural resources which provide for wildlife habitat, pollution control, storage and passage of flood waters, aquifer recharge, erosion control, education, scientific study, recreation and open space. Considerable wetland acreage nationally has been lost or impaired by drainage, dredging, filling, excavating, building, polluting, and other activities inconsistent with the natural uses of such areas. Therefore, it is the policy of the Town of Cape Elizabeth to ensure that wetlands are protected from detrimental impacts and that wetland alteration activities do not threaten public safety, welfare or cause nuisances, or negatively alter natural wetland ecology.

Id. (Ch. 19, sec. 19-3-9-01).

13. The amendments did not single out any particular properties in the Town for rezoning. (McGovern Aff. ¶ 5).

14. The general areas that were the subject of the proposed amendments were described in the proposed Ordinance. (Smith Aff. ¶ 4 & Exh. 2).

15. They were also reflected on a map that was publically available and posted at Town Hall

before the public hearings leading to the amendment's adoption. (McGovern Aff. ¶ 4 & Exh. 1).

16. The 1990 amendment provided a means for a landowner to verify the location of wetlands boundaries. (Smith Aff. ¶ 4 & Exh. 2 (Ch. 19, sec. 19-3-9-09)).

17. The 1990 amendment provides that no development of houses can occur in critical wetland districts. *Id.* (Ch. 19, sec. 19-2-8-02).

18. Moreover, in relevant part the amendment forbade development of houses within 250 feet of any critical wetland district that is not separated from adjacent areas by topography or other natural features. *Id.* (Ch. 19, sec. 19-3-9-06).[3]

19. In March of 1996, the Plaintiff submitted to the Town's Code Enforcement Officer a building permit application to construct a single-family residence on the Subject Property. The CEO denied the application on April 10, 1996. (Appellees' Rule 80B Brief Exh. 1).

20. The Plaintiff's submitted additional materials in support of its application by a letter dated May 10, 1996. *Id.* Exh. 2.

21. The CEO again denied the Plaintiff's application. *Id.* Exh. 3.

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[3] These provisions remained substantively unchanged when the Plaintiff requested a building permit in March of 1996. For ease of reference, it should be noted that the zones received new nomenclature in the interim period. Specifically, the critical wetland zones were renamed "Resource Protection 1 – Critical Wetland Zones" ("RP-1"), the buffer zones renamed "Resource Protection 1 – Critical Wetland Buffer" ("RP-1 Buffer"), and the wetland protection zones renamed "Resource Protection 2 – Wetland Protection Zones" ("RP-2").

22. The Plaintiff requested a verification of the wetland boundary. (Record at R-57).

23. The Town Planning Board received a substantial amount of information on the location of the boundary and held a public hearing. *Id.* at R-107.

24. The Planning Board concluded that the RP-1 zone included areas both south and north of Dyer Pond Road. *Id.* at R-107-08.

25. This decision has been affirmed by this Court. Decision and Order at 1-2 (July 16, 1998).

26. The effect of this decision was to confirm the application of the 250 foot buffer overlay on the Plaintiff's property. *Id.* at R-107-08.

27. On August 6, 1997, the Plaintiff "appealed" the Planning Board's decision to the Town Board of Zoning Appeals. *Id.* at R-110.

28. At the same time, the Plaintiff requested that the Zoning Appeals Board grant it a variance on the 250 buffer zone. *Id.* at R-125-27.

29. After a public hearing on August 26, 1997, the Zoning Appeals Board ruled that it had no authority to hear the appeal from the Planning Board and that it could not grant a variance that contradicted the uses permitted in the RP-1 Buffer Zone. *Id.* at R-139, 143.

30. The Court has also affirmed these findings by the Zoning Appeals Board. *Decision and Order* at 1-2 (July 16, 1998).

31. According to the Plaintiff, the Subject Property retains some value despite the effect of the Town's ordinance. (Cope Dep. at 49).

32. The Plaintiff testified that the Property is still worth at least $3,000. (Cope Dep. at 49).

33. In addition, the Plaintiff admits that the Town has never made any promises about the buildability of the Subject Property. (Cope Dep. at 38).

34. The Court has already determined that the Subject Property contains poorly drained soils. *Decision and Order* at 1-2 (July 16, 1998) (citing Record at 21, 73-75; Appendix at 11).

35. In addition, the Court has ruled that sufficient evidence exists to support the Town Planning Board's conclusion that a "Resource Protection 1 – Critical Wetland Zone" (as that term is defined by the Ordinance) extends from land south of Dyer Pond Road to land north of that Road. *Id.*

36. In 1996 and 1997, the Town had purchased various insurance policies, including general liability and public officials coverages. (McGovern Aff. ¶ 6).

37. However, all of these policies are amended by endorsements that restrict liability coverage to those instances where the Maine Tort Claims Act expressly waives the Town's immunity pursuant to 14 M.R.S.A. § 8104-A. (McGovern Aff. ¶ 7 & Exhs. 2 & 3).

38. The endorsements state that "[l]iability coverage shall not be deemed a waiver of any immunities or limitation of damages available under the Maine Tort Claims Act." *Id.*

39. Mitchell Cope, partner of the Plaintiff, was an officer, shareholder, or partner of all entities that owned the Subject Parcel from 1964.

40. The chain of title from 1964 to the present includes:

a. Linda Adams to The Minat Corporation by deed dated February 28, 1964 and recorded in the Cumberland County Registry of Deeds at Book 2806, Page 496.

b. The Minat Corporation to Arthar, Inc., by deed dated June 9, 1964 and recorded in the Cumberland County Registry of Deeds at Book 2836, Page 69.

c. Arthar Corp. to Pine Tree Acres by deed dated December 24, 1979 and recorded in the Cumberland County Registry of Deeds at Book 4548, Page 311.

d. Pine Tree Acres to M.C. Associates by deed dated January 11, 1989 and recorded in the Cumberland County Registry of Deeds at Book 8629, Page 137.

41. Mitchell Cope testified that each of these entities was separate and distinct.

42. Mitchell Cope testified that he considered the Subject Property "some retirement pay" and thought of it as part of his "estate planning."

43. The Official Zoning Map of the Town of Cape Elizabeth at the time the Plaintiff applied for its building permit shows the Subject Parcel being zoned Residential-A. A color copy of the Town's Official Zoning Map is attached to the Plaintiff's Opposition.

44. As the Court has already determined, at the time the Plaintiff applied for a building permit the Subject Parcel was also subject to a 250 foot buffer zone that was determined by field verification, as provided for in the Ordinance.

45. The Ordinance in effect as of January 11, 1989 also provides that if the lot area is less than

twenty thousand (20,000) square feet, the lot may be buildable if it meets the requirements of Section 19-3-3 and the State Minimum Lot Size statute.

46. Mitchell Cope testified that the Town assessed property taxes, and that the owner paid property taxes, in an amount that in his belief reflected that the lot was buildable.

47. The Town of Cape Elizabeth issued a street entrance permit for the Subject Parcel on June 23, 1989. The Permit is attached to Mr. Cope's Deposition as Exhibit 2.

48. The Town issues street entrance permits when it determines that the placement of a street entrance will not create a sight-line hazard to the lot owner or the public given the speed limit applicable to the relevant street.

49. Mitchell Cope testified that he relied on the Zoning Map of the Town to determine that the Subject Parcel was zoned to allow the construction of a single-family home.

50. At the request of the Plaintiff, Walter Stinson, a professional engineer, prepared a Subsurface Wastewater Disposal System Application dated December 16, 1988. The Application is attached to Mr. Cope's Deposition as Exhibit 1.

51. The Town never approved the Application dated December 16, 1988.

52. Also at the Plaintiff's request, an appraiser prepared two estimates as to the value of the Subject Property. The appraiser estimated the Subject Property's value as $88,000 as a "buildable" lot and $3,000 as a "non-buildable" lot.

The parties do not stipulate that these valuations are accurate or correct; the parties merely agree that the appraiser made these opinions.

Dated at Portland, Maine, this 22nd day of February, 2000.

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